SCC Court File No: 40061

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)
IN THE MATTER OF a Reference to the Court of Appeal of Québec in relation to the *Act respecting First Nations, Inuit and Métis children, youth and families* (Order in Council No.: 1288-2019)

BETWEEN:

ATTORNEY GENERAL OF QUÉBEC

APPELLANT

-and-

ATTORNEY GENERAL OF CANADA, ASSEMBLY OF FIRST NATIONS QUEBEC-LABRADOR, FIRST NATIONS OF QUEBEC AND LABRADOR HEALTH AND SOCIAL SERVICES COMMISSION, MAKIVIK CORPORATION, ASSEMBLY OF FIRST NATIONS, ASENIWUCHE WINEWAK NATION OF CANADA, and FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

RESPONDENTS

-and-

ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA and ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES

INTERVENERS

[Style of cause continued on next page]

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PART I – OVERVIEW AND FACTS

1. In response to the enduring over-representation of Indigenous children and youth in care, Parliament enacted *An Act respecting First Nations, Inuit and Métis children, youth and families*[1] (the "*Act*"). Indigenous child and family services is a clear example of a matter of double aspect, with both provinces and Parliament having jurisdiction to legislate.

2. Alberta's child welfare legislation aims to ensure that Indigenous children are raised in their communities, with their families and according to their cultures and traditions, whenever possible.[2] Further, the Government of Alberta, as a partner in federation, is committed to reconciliation with Indigenous Canadians and to reducing the number of Indigenous children in care. However, efforts to achieve reconciliation must respect Canada's constitutional architecture, including the numerous constitutional instruments in force across the country, Canada's historic and modern treaties with First Nations, and the common law on Aboriginal rights.

3. The *Act* attempts to provide a framework for Indigenous communities to exercise legislative authority over child and family services. However, this framework and the associated legislative authority are predicated on Parliament's unilateral affirmation of an inherent right of self-government. Such a unilateral affirmation trenches on provincial jurisdiction, is *ultra vires* Parliament and inconsistent with s. 35 of the *Constitution Act, 1982* (*C.A. 1982*).

PART II – ISSUES

4. The Minister of Justice and Solicitor General, acting in his capacity as the Attorney General of Alberta (AGA), will focus his submissions on the following issues on appeal:

(1) the Quebec Court of Appeal (QCCA) erred in holding that s. 35(1) of the *C.A. 1982* contains a generic, universal self-government right; and

(2) ss. 18, 20(2), 20(3), 21(1) and 22(3) of the *Act* are invalid as they expand the scope of rights recognized in s. 35 of the *C.A. 1982*.

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[1] SC 2019, c 24 [*Act*].

[2] *Child, Youth and Family Enhancement Act*, RSA 2000, c.C-12, ss. 1(1)(m.01), 1.1(d), 2(1)(c) and (j)(iii), 52(1.3), 56(1.2), 57.01, 58.1(d), 63(1)(f), (2)(f), and (3)(e), 70(2.1), 71.1, 74.4(1), 107 and 131.2(3)(a)(i).

PART III- ARGUMENT

A. The QCCA erred in law in recognizing a generic, universal right of self-government

5. There are important legal and policy reasons underlying the need for a case-by-case approach in the determination of Aboriginal rights, as the acknowledgment of a s. 35(1) right results in granting special constitutional protection to one part of Canadian society.[3] The QCCA therefore erred in law when it: (1) answered, in the context of a reference case, a question that was not before it and about which it had no proper evidentiary record; and (2) dispensed with binding authority from this Court - in particular, the *Van der Peet* test - in order to find a generic right of self-government over child and family services is held by all Indigenous groups in Canada.[4]

1. The reference procedure should not be used to determine section 35(1) rights

6. The AGQ's reference question to the QCCA simply asked whether the *Act* was *ultra vires* Parliament's jurisdiction. The question did not ask whether a s. 35(1)-protected right of self-government exists, or the scope and content of such right, or by whom it is held. Given the scope of the reference, the QCCA should have refrained from opining on whether s. 35(1) recognizes and affirms an inherent right to self-government.

7. Section 35(1) provides the constitutional framework to acknowledge and reconcile the sovereignty of the Crown with the fact that Aboriginal peoples already lived on the land in distinctive societies, with their own practices, traditions and cultures.[5] Questions concerning the existence, scope and content of Aboriginal rights should be decided on a specific rather than general basis, based on an appropriate factual and evidentiary record, in order to uphold the purpose of s. 35(1).[6]

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[3] *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*] at paras 20, 48-75.
[4] Quebec Court of Appeal [QCCA] Opinion at paras 59, 487-489, 494.
[5] *Van der Peet*, *supra* note 3 at para 31; R v *Desautel* 2021 SCC 17 [*Desautel*] at para 26; *R v Pamajewon*, [1996] 2 SCR 821 [*Pamajewon*] at paras 23-26.
[6] *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 [*Kitkatla*] at para 46; *Enge v Mandeville*, 2013 NWTSC 33 at para 18; *Kanekota v Canada*, 2013 FC 350 at para 7.

8. Sparse or equivocal evidence cannot serve as the basis for establishing the existence of a s.35(1) right.[7] Further, constitutional issues should not be decided in a factual vacuum.[8] Otherwise, decisions may be ill-considered and cause unintended mischief in future cases. Aboriginal rights are specific to particular indigenous groups and need to be determined in relation to their distinctive activities, customs and traditions. There is a great deal of diversity of Indigenous groups in Canada, with unique history and practices. This is why Aboriginal rights must be - if not negotiated by the appropriate parties - established in a trial, on the basis of properly tested evidence, and with the involvement of all interested and affected parties.[9]

9. Further, the QCCA was not entitled to overrule binding jurisprudence of this Court or relieve courts of their duty to follow binding decisions, including those relating to asserted rights of self-government. In *Reference re Secession of Quebec,* this Court noted that "no matter how closely the procedure on a reference may mirror the litigation process, a reference does not engage the Court in a disposition of rights."[10]

10. Ultimately, in light of the factual and evidentiary deficiencies and binding case law on Aboriginal rights adjudication, the QCCA should have recognized that it was unwise and improper to render an opinion on the existence of a s. 35(1) right.

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[7] *Mitchell v MNR*, 2001 SCC 33 [*Mitchell*] at paras 3, 51, cited in *Kitkatla, supra* note 6 at para 46 and in *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 [*Uashaunnuat*] at para 224; *Fort Chipewyan Métis Nation of Alberta Local #125 v Alberta*, 2016 ABQB 713 [*Fort Chipewyan*] at para 344.

[8] *MacKay v Manitoba*, [1989] 2 SCR 357 (SCC) at p. 361-364 and 366; *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086 (SCC) at p. 1101; *Hy & Zel's Inc v Ontario*, [1993] 3 SCR 675 (SCC) at p. 693-694; *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 (SCC) at para 9; *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54 (SCC) at 76-78; *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Secession Reference*] at para 30.

[9] *R v Sparrow*, [1990] 1 SCR 1075 (SCC), at p. 1120-1121; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 (SCC) [*Delgamuukw*] at paras 170-171, 184-186; *Re (TR)*, 2004 SKQB 503 at paras 52-61; *Ochapowace Indian Band v Saskatchewan (Department of Community Resources)*, 2007 SKQB 200 at paras 4-5; affirmed *Ochapowace Indian Band v Saskatchewan (Department of Community Resources)*, 2008 SKCA 48.

[10] *Secession Reference, supra* note 8 at para 25.

2. The QCCA erred in law when it dispensed with the *Van der Peet* test

11. The QCCA took a result-oriented approach which dispensed with the *Van der Peet* test. In doing so, the QCCA characterized the right to self-government in excessively general terms. *Van der Peet* is a test that can be applied only in the context of a specific claimant community, with an examination of whether the right claimed is a practice, custom or tradition that is integral to that distinctive society.[11]

12. As discussed above, it was inappropriate for the QCCA to have given its opinion on whether s. 35(1) includes an inherent right to self-government.[12] However, the QCCA did engage in this analysis, and in doing so, failed to adequately consider the scope and content of the right, and whether such a right would be incompatible with Crown sovereignty, had been surrendered through treaty, or extinguished.[13] These questions can only be fairly adjudicated in the context of a specific fact scenario in which the right is clearly characterized, evidence is tendered and the relevant stakeholders have the opportunity to make submissions.[14] This is why the *Van der Peet* test was structured as it was by this Court, and why it remains the appropriate framework for determining the existence, scope and content of a s. 35(1) right.

13. The QCCA's starting premise was that the self-government right does exist:[15] the Court then set about a selective application of facts and case law to support this conclusion. The QCCA also demonstrated a misunderstanding of s. 35(1), holding that its premise "is that Aboriginal peoples are founding partners of Canada with a right to self-government in certain areas of jurisdiction of particular interest to them."[16] Rather, s. 35(1) is "aimed at reconciling the prior occupation of North America by aboriginal societies with the Crown's assertion of sovereignty [and] the test for establishing an aboriginal right focuses on identifying the integral, defining

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[11] *Van der Peet*, *supra* note 3 at paras 51, 69, 79; *Pamajewon*, *supra* note 5 at para 27; *R v Sappier, R v Gray*, 2006 SCC 54 [*Sappier*] at para 22.
[12] AGQ Factum, at paras 84-91.
[13] QCCA Opinion, at paras 458-459.
[14] *Lax Kw'alaams Indian Band v Canada*, 2011 SCC 56 [*Lax Kw'alaams*] at paras 12, 40-46.
[15] QCCA Opinion, at paras 363-364.
[16] QCCA Opinion, at para 560.

features of those societies".[17] It is the integral, defining features of indigenous societies that may receive protection under s.35(1), not merely "areas of particular interest".[18]

14. There was no clear rationale for the QCCA's "adaptation," which is in fact an abandonment, of the binding jurisprudence of this Court as set out in *Van der Peet*[19] and confirmed in *Pamajewon*.[20] There is no attempt to characterize the right with any precision, and the Court itself notes that the regulation of child and family services is "not necessarily based on the practice of distinctive cultural activities in the strict sense."[21] Instead, the QCCA was prepared to find the right existed as, in its view, it considered that having jurisdiction over child and family services is tied to the cultural survival of Aboriginal peoples.[22]

15. In the result, the QCCA recognized that all Indigenous people hold a right of self-government, which includes the right to regulate their own child and family services.[23] It did so without any consideration or examination of the specific history and circumstances of the various Indigenous groups in Canada. Having done away with the requirement that a right needs to reflect a practice, custom or activity that was integral to the distinctive society asserting the right, the QCCA has recognized a third order of government whose relation to the Canadian constitutional order is unclear.

16. No clarity as to the scope of the right can be found in the *Act*. The *Act* also contains an overly broad definition of the right it has "recognized and affirmed." Section 18 describes the "inherent right of self-government... [which] includes jurisdiction in relation to child and family services."[24] "Child and family services" is defined in the *Act* as "services to support children and families, including prevention services, early intervention services and child protection services."[25] These terms are not further clarified in the *Act*, nor are they terms of art with a clearly understood meaning. Further, the term "self-government" itself is not a term of art that can be

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[17] *Mitchell*, *supra* note 7 at para 12.
[18] *Van der Peet*, *supra* note 3 at paras 55-59.
[19] QCCA Opinion, at para 425.
[20] *Pamajewon*, *supra* note 5 at para 23-25.
[21] QCCA Opinion, at para 486.
[22] *Ibid*.
[23] QCCA Opinion, at para 471.
[24] *Act*, *supra* note 1 at s. 18(1).
[25] *Act*, *supra* note 1 at s. 1.

easily defined. This overly broad characterization of the right found in the *Act* is not cognizable at law, which the AGA submits will in turn lead to overly broad and potentially constitutionally non-compliant laws being made by Indigenous communities, groups or peoples (IGCP laws).

(a) A generic declaration of an inherent right of self-government does not permit a meaningful analysis of compatibility with Crown sovereignty

17. The QCCA addressed the question of compatibility between the right of self-government and Crown sovereignty only in a cursory manner, allowing it to conclude that:

> …unlike the regulation of military activities discussed by Binnie, J. in *Mitchell*, it cannot seriously be argued that Aboriginal regulation of their own child and family services would pose an existential threat to Canadian sovereignty or to the Canadian legal order, or that it would be incompatible with either of those.[26]

18. Such a cursory analysis is insufficient to meet the purpose of s. 35(1). A meaningful analysis of whether the right of self-government is compatible with Crown sovereignty is critical.[27] The *Van der Peet* test properly recognizes that Aboriginal rights exist within the general legal system of Canada.[28] Indigenous people are members of Canadian society and are entitled to the protections and benefits of Canada's legal system. In recognition of these facts, this Court has previously held that:

> Aboriginal rights litigation is of great importance to non-Aboriginal communities as well as to Aboriginal communities, and to the economic well-being of both. The existence and scope of Aboriginal rights protected as they are under s.35(1) of the *C.A. 1982*, must be determined after a full hearing that is fair to all the stakeholders.[29]

19. Reconciliation, which is at the heart of s.35(1), may at times require constitutional protection for certain rights to be adapted, to take into consideration the compelling and substantial interests of Canadian society, and to avoid upsetting the Canadian legal system.[30] As noted earlier,

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[26] QCCA Opinion, at para 493.
[27] *Robertson v Canada*, 2017 FCA 168 at para 42; *Mitchell*, *supra* note 7 at para 10; *Van der Peet*, *supra* note 3 at paras 57-59.
[28] *Van der Peet*, *supra* note 3 at para 49.
[29] *Lax Kw'alaams*, *supra* note 14, at para 12.
[30] Sébastien Grammond, *Terms of Co-existence: Indigenous Peoples and Canadian Law* (Toronto: Carswell, 2013) at p. 216 [Book of Authorities Tab 2].

the QCCA's approach provides no mechanism for reconciling Aboriginal interests with those of the broader Canadian society.

20. A practical illustration of the challenges that arise from the abandonment of the *Van der Peet* framework are found in an IGCP law, enacted by the Louis Bull Tribe (AMO Law),[31] to which the *Act* has given the force of federal law and made paramount over Alberta law. There are several respects in which this law may be inconsistent with Crown sovereignty, including:

- asserting jurisdiction over all Louis Bull children in care including those outside Canada;[32]
- asserting jurisdiction not only over children who are registered as members of the Louis Bull Tribe, but also children who are not registered as such;[33]
- by ousting the jurisdiction of Provincial Courts to hear any applications respecting such children under Alberta's child and family services legislation, without the consent of the Children's Commissioner appointed under the AMO Law;[34]
- unilaterally determining which *Rules of Court* of courts of competent jurisdiction do or do not apply to proceedings under AMO Law[35]; and
- by failing to establish an alternative forum in which parties can be heard in the first instance, or appeal a decision made pursuant to the AMO Law, including those whose *Charter* rights are engaged.[36]

21. If the approach of the QCCA is adopted, the sovereignty horse will have left the barn. That is, the time would be past for engaging in a *Van der Peet* analysis. It is therefore unclear how irreconcilable conflicts with Crown sovereignty would be resolved once an IGCP Law has been

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[31] Canada, *Notices and requests related to An Act respecting First Nations, Inuit and Métis children, youth and families* [Notices and requests related to An Act], online: https://www.sac-isc.gc.ca/eng/1608565826510/1608565862367; AMO Law, online: https://amosociety.ca/amo-law/.
[32] AMO Law, *ibid* at s. 3.5 and 3.6.
[33] AMO Law, *ibid* at s. 2 (definition of Awasisahk), 3.2, 3.3.
[34] AMO Law, *ibid* at s. 3.9.
[35] AMO Law, *ibid* at s.14.
[36] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46; *LC v Alberta*, 2014 ABQB 183 at paras 66-67.

enacted. As the AGQ correctly notes, the *Sparrow* justification test is not designed to resolve conflicts of law.[37]

(b) Extinguishment and surrender cannot be considered in a factual vacuum

22. The QCCA failed to engage in *any* examination of whether a right to self-government was surrendered, including through the various treaties that are part of Canada's legal landscape. After a truncated analysis, the QCCA concluded that the division of powers in the *Constitutional Act, 1867* (*C.A. 1867*) was not exhaustive, as room was made for British statutes and common law at Confederation.[38] The QCCA's examination of whether the right was extinguished by statute is similarly brief, merely noting that none of the parties directed it to such legislation.[39] However, this was outside the scope of the reference question asked by the AGQ, therefore the parties did not make specific arguments on this issue.[40]

23. For provinces such as Alberta, the constitutional landscape associated with the interpretation of s. 35(1) Aboriginal rights is informed by the numbered treaties, which include clauses including the cede and surrender of aboriginal rights, and by other constitutional documents such as the *Natural Resources Transfer Agreement, 1930*.[41] Any claims of section 35(1) aboriginal rights must involve a proper consideration of the effects of these constitutional documents.

(c) Who is entitled to the benefit of the *Act*?

24. Aboriginal rights "must be grounded in the existence of a historic and present-day community."[42] Those who seek the benefits of constitutionally protected status must prove it at some point: such status should not be available just for the asking.[43] Alberta's Court of Appeal has noted that there is nothing "improper about jealously guarding entrenched constitutional rights,

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[37] AGQ Factum, at para 112.
[38] QCCA Opinion, at para 463.
[39] QCCA Opinion, at para 461.
[40] AGQ Factum, at paras 89-91.
[41] *Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930,* Schedule 2).
[42] *Desautel*, *supra* note 5 at para 59, citing R v *Powley*, 2003 SCC 43 at para 24.
[43] *L'Hirondelle v Alberta (Sustainable Resource Development)*, 2013 ABCA 12 [*L'Hirondelle*] at para 42.

and ensuring that only those truly entitled are allowed to assert those rights," and further that legitimate rights holders are "entitled to expect that their rights will not be watered down by the recognition of unentitled claimants."[44]

25. However, the *Act* does not require that an "Indigenous, group, community or people"[45] (Indigenous Group) demonstrate that it has established s. 35(1) rights to self-government, or at all, before it can authorize an Indigenous governing body (IGB) or exercise legislative authority under the *Act*.[46] The AGC suggests that the need for a group to establish itself as a rights holding community would be "rare,"[47] and would "not require detailed historical evidence."[48] It therefore appears likely that the federal government has dispensed with the need to engage in any meaningful examination of this threshold question.

26. However, the AGA submits that the need to answer this question is not as rare as the AGC suggests, and a careful analysis is required when a group is not a recognized rights holder.[49] There are a number of Indigenous Groups in Canada with asserted yet not established Aboriginal rights. Métis in Alberta present one such example. In Alberta, while the Alberta government has adopted a Metis Settlement Consultation Policy[50] and has recognized certain non-Settlement Métis groups as having recognized credibly-asserted rights entitling them to consultation, to date no Métis group has established a successful claim to s. 35 Aboriginal Métis rights. The Alberta courts have also noted ongoing issues about who represents non-settlement Métis in Alberta.[51]

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[44] *L'Hirondelle*, *ibid* at para 39, leave to appeal denied at 2013 CanLII 35703 (SCC).
[45] See *Act*, *supra* note 1 at s. 1 definition of IGB.
[46] AGC Court of Appeal Factum at para 125.
[47] AGC Factum at para 160-161.
[48] AGC Factum at para 165.
[49] *Desautel*, *supra* note 5 at para 20; *Fort Chipewyan*, *supra* note 7 at paras 81-85; *Joyce v Nova Scotia*, 2022 NSSC 22 at paras 139-141.
[50] *Metis Settlements Act*, RSA 2000 c M-14; Indigenous Relations, *The Government of Alberta's policy on consultation with Metis Settlements on Land and Natural Resource Management, 2015*, online: https://open.alberta.ca/publications/policy-on-consultation-with-metis-settlements-2015
[51] See for example, *Métis Nation of Alberta Association v Alberta (Indigenous Relations)* 2022 ABQB 6 at paras 231-237, 400; *Fort McKay Métis Community Association v Métis Nation of Alberta Association*, 2019 ABQB 892 at paras 1-2; *McCargar v Métis Nation of Alberta Association*, 2018 ABQB 553 at paras 14-18, 27, 35-41.

27. Without a meaningful examination of whether an Indigenous Group holds s.35(1) rights, there is the potential that unentitled claimants may inappropriately exercise legislative authority under the *Act*, that multiple groups with overlapping memberships may enact competing Indigenous laws, or alternatively that the federal government will be in the position of picking winners and losers, possibly at the expense of legitimate rights holders. The AGA submits that conflicts about the nature of the community and who may represent it should be left to the courts, as neutral arbiters, rather than being decided on a unilateral basis by the federal government.

(d) UNDRIP does not change Canadian law

28. The QCCA and the AGC rely on the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) to justify the *Act*.[52] However, UNDRIP is (and only purports to be) non-binding and aspirational.[53] UNDRIP's aspirational principles do not create substantive rights in Canada.[54] It does not override our Constitution, the constitutional common law, or either federal or provincial domestic legislation.[55]

29. The determination of whether a claimed Aboriginal or treaty right enjoys constitutional protection under s. 35(1) is a matter of constitutional law.[56] The purpose of s. 35(1) is to reconcile the practices, traditions and cultures of distinctive Aboriginal societies with the sovereignty of the Crown. The legal tests set by this Court to determine the existence of Aboriginal rights incorporate this underlying purpose of s. 35(1).[57]

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[52] QCCA Decision, at paras 506-513; AGC Factum at paras 27, 42, 60, 130-133, 157, 163, 198.
[53] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [UNDRIP] preamble; UNDRIP was adopted as an Annex to a General Assembly resolution, and such resolutions, including declarations, are non-binding.
[54] *TA v Alberta (Children's Services)*, 2020 ABQB 97 at para 79.
[55] UNDRIP, *supra* note 53 similarly does not alter Canada's constitutional law: ss. 5, 6.
[56] *Uashaunnuat*, *supra* note 7 at para 64.
[57] *Van der Peet*, *supra* note 3 at paras 31-32, 44; *Delgamuukw*, *supra* note 9 at para 186; *Mitchell*, *supra* note 7 at para 80; *Sappier*, *supra* note 11 at para 22; *R v Hirsekorn*, 2013 ABCA 242 at para 47; *Beaver v Hill*, 2018 ONCA 816 at paras 28-34; *Rice v Agence du revenue du Quebec*, 2016 QCCA 666 at paras 29-30.

30. This Court has never relied on non-binding international instruments to define the scope of constitutional rights.[58] Similarly, this Court should not rely on such tools to define the scope of s. 35(1) rights in this context. This Court should remain guided by the purposive approach to constitutional interpretation prescribed in *Big M Drug Mart.*[59] Primary focus must be placed on the existing common law within Canada, the treaties, and various Canadian constitutional instruments. Both the QCCA and the AGC fail to consider UNDRIP's non-binding nature and its limited persuasive value as an interpretive tool for determining s. 35(1) rights.

(e) Conclusion on Generic Right

31. The QCCA's recognition of a broad, generic right of self-government strains the Canadian legal and constitutional order, in effect creating an undefined third order of government, without clarity as to the extent of jurisdiction resting within that third order of government.

32. The approach endorsed by the QCCA should be rejected. There are no inherent limits to the right of self-government as characterized by the QCCA, nor is there an adequate examination of the questions of who may hold the right, whether the right has been extinguished, surrendered, or is incompatible with Crown sovereignty. The *Van der Peet* test, by contrast, ensures that these questions are given due weight prior to the recognition of a new s. 35(1) right.

B. Sections 18, 20(2), 20(3), 21(1) and 22(3) are invalid as they expand the scope of rights recognized in section 35(1) of the *C.A. 1982*

1. A federal declaratory provision cannot alter the constitutional division of powers

33. In the AGA's submission, the QCCA was correct to find that ss. 21(1) and 22(3) are *ultra vires* as beyond s. 91(24) of the *C.A. 1867* in seeking to extend federal paramountcy to s. 35(1) rights.[60] The AGA believes the QCCA was also correct to find Parliament's approach in s. 18 of the *Act* of declaring its view that s. 35(1) of the *C.A. 1982* includes "the inherent right of self-government" with "jurisdiction in relation to child and family services, including legislative

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[58] *Quebec (Attorney General) v 9147-0732 Québec Inc*, 2020 SCC 32 [*9147-0732 Quebec Inc*] at paras 22, 28, and 37.
[59] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, most recently discussed and approved of in *9147-0732 Québec Inc, ibid.*
[60] QCCA Opinion, at paras 64, 65, and 530-570.

authority in relation to those services and authority to administer and enforce laws made under that legislative authority" is indeed "uncommon"[61] and "unusual."[62] It is also unconstitutional.

34. As this Court has recognized, a declaratory provision enacted by Parliament relating to the interpretation of its own statute cannot alter the constitutional division of legislative authority.[63] The assertion by Parliament that a provision is only declaratory in effect will not alter its import.[64]

35. Sections 18, 20(2), 20(3) and 21(1) of the *Act* attempt to provide the framework for the coordination of "the exercise of the legislative authority" between the provinces, IGBs and the federal government. The purpose and effect of these sections is to seek to unilaterally define the rights in s. 35(1).

36. Parliament is using its s. 91(24) power in these sections to expand the scope of s. 35(1) in two ways. First, by claiming (without prior judicial determination[65]) that IGCP Laws have independent force of law while actually giving these laws force of law by incorporating them as federal law.[66] Second, by defining the agreement by which IGBs request provinces to coordinate measures pursuant to IGCP Laws as being "in relation to the exercise of the legislative authority" unilaterally declared to exist in s. 18.[67] In so doing, these sections are *ultra vires* as it is beyond Parliament's s. 91(24) powers to dictate and bind the provinces to Parliament's view on the scope of s. 35(1).

37. Parliament cannot use its authority under s. 91(24) of the *C.A. 1867* to restrict or broaden the scope of s. 35(1) of the *C.A. 1982*[68] because "the determination of whether a claimed Aboriginal or treaty right enjoys constitutional protection under s. 35(1) is a matter of

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[61] QCCA Opinion, at para 515: "uncommon, if not unusual".
[62] QCCA Opinion, at para 222 but see *contra* at para 515.
[63] *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 38. See also *Reference re Sections 5 and 6 of the Supreme Court Act*, 2014 SCC 21 [*Supreme Court Act Reference*] at paras 5 and 106.
[64] *Supreme Court Act Reference*, *ibid* at para 106.
[65] AGC Factum at para 146.
[66] *Act*, *supra* note 1 at s. 21(1). See also ss. 19, 20(1), 20(3), 21(2) and (3), 24 and 25(c).
[67] *Act*, *supra* note 1 at s. 20(2).
[68] QCCA Opinion, at para 548. See also AGC QCCA Factum, at para 153.

constitutional law, not of federal law or provincial law."[69] The constitutional history of this country shows that expanding the scope of s. 35(1) can only be achieved by constitutional amendment, tripartite agreement, or judicial determination.[70] Parliament can exercise its s. 91(24) power to enact legislation that grants legislative power, not a new constitutional right.

38. The AGC argues s. 18 "simply sets out Parliament's position" that s. 35(1) includes a right of self-government in relation to child and family services.[71] However, s. 18 goes beyond a mere declaration of position. The framework of Part II of the *Act* rests fully on a recognition of the s. 35(1) right, and not simply a statement of "position."[72]

39. Indeed, because ss. 21(1) and 22(3) of the *Act* rest on the right declared in s. 18, the QCCA found them *ultra vires* Parliament. The use of incorporation by reference to give ICGP Laws enacted pursuant to the right recognized by Parliament in s. 18 the force of federal law is illegitimate as not being for valid "federal purposes."[73]

40. Similarly, ss. 20(2), 20(3), and 21(1) are beyond the ambit of s. 91(24), given their impact on the scope of s. 35(1) in: (1) seeking to give IGCP Laws the independent force of law; and (2) requiring that provinces must agree as a condition of a coordination agreement that Indigenous Groups have an inherent right of "legislative authority" and that IGCP Laws have the independent force of law.

2. Part II of the *Act* is *ultra vires* as it improperly rests on a unilateral expansion of section 35 rights

41. The effect of Part II of the *Act* is not merely to facilitate the exercise of the inherent right.[74] Rather, these provisions in conjunction with the declaration in s. 18 operate to expand the scope

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[69] *Uashaunnuat*, *supra* note 7 at para 64.
[70] AGQ Factum, at paras 34-83.
[71] AGC Factum at para 91, and AGC Factum QCCA at para 153.
[72] Section 18 by itself is also influencing the common law. For example in *MM v Alberta (Child, Youth and Family Enhancement Act, Director)*, 2021 ABPC 317 at para 33, the Court stated "Federal law recently confirmed again that Indigenous people in Canada have inherent rights".
[73] QCCA Opinion, at paras 537-538.
[74] QCCA Opinion, at paras 196, 199 and 253. AGC Factum at paras 5, 30, 58, 96, 102, 147, 184, 193 and 194.

of s. 35(1), by (1) unilaterally creating and recognizing a third order of government and (2) dictating to the provinces the acceptance of Parliament's view on the existence of the inherent right and thus recognition of the third order of government.

42. Section 18(1) of the *Act* declares Indigenous Groups to have "legislative authority" in relation to child and family services. When an Indigenous Group exercises this "legislative authority" to create an IGCP Law, and an IGB acting on behalf of the Indigenous Group requests the federal Minister[75] and provincial governments to enter a coordination agreement under s. 20(2), the *Act* through ss. 20(3) and 21(1) not only gives the IGCP Law the "same force of law as federal laws,"[76] it also recognizes the IGCP Law as having independent force arising from the exercise of the declared "legislative authority." This is clear from the wording of s. 21(1), which only gives "the force of federal law" to "[a] law, amended from time to time, of an Indigenous group, community or people referred to in subsection 20(3) … during the period that the law is in force…" It is a pre-condition to an IGCP Law obtaining the force of federal law that it already be in force as a result of an exercise of the "legislative authority."[77]

43. Child and family services are matters squarely within provincial jurisdiction.[78] Provinces still have a critical role to play in the coordination of the provision of child and family services to Indigenous children and families, even where Parliament substantially takes this subject matter over pursuant to its s. 91(24) power. Tripartite negotiated agreements are of utmost importance in seeing that the best interests of Indigenous children continue to be paramount and in allowing Indigenous children to be raised in their communities according to their cultures and traditions.

44. However, the combined effect of ss. 20(2), (3) and 21(1) is that a province served with a request to "enter into a coordination agreement,"[79] statutorily defined as being "in relation to the exercise of the legislative authority,"[80] has little ability to qualify, dispute or deny the existence of the inherent right. Rather, given the language in s. 20(2) and the structure of Part II of the *Act*, a

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[75] *Act*, *supra* note 1 at s. 6.
[76] QCCA Opinion, at para 32.
[77] See also *Act*, *supra* note 1 at ss. 19(1), 23, 24, 25(c) and 26. See AGC Factum at paras 186, 187, and 203.
[78] *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 [*NIL/TU,O*] at paras 24 and 45. See also QCCA Opinion, at para 552.
[79] *Act*, *supra* note 1 at s. 20(2).
[80] *Ibid.*

province has just two choices. It can enter a coordination agreement and thereby risk being seen to confirm the existence of the "legislative authority". Alternatively, a province can try to negotiate a coordination agreement that makes clear its view that, contrary to the declaration in s. 18, s. 35(1) does not include an inherent right to self-government.

45. Nevertheless, if the second approach is taken and no agreement reached, then pursuant to s. 20(3), after one-year the IGCP Law may be recognized by Canada as having both the force of federal law and independent force as an IGCP Law. Thus, a critical, and potentially disputed, term of the coordination agreement (the question of whether s. 35(1) includes a right to self-government) is effectively removed from negotiations by the unilateral action of Parliament. Provinces are also foreclosed from recognizing IGCP Laws as having force solely as federal law pursuant to Parliament's s. 91(24) authority.

46. The importance of tripartite agreements to coordinate successful implementation of greater Indigenous control over child and family services is heightened by the lack of a federal commitment to fund the Indigenous jurisdiction sought to be implemented by Part II of the *Act*. Without the federal government providing service delivery or sustainable funding, the *Act* risks repeating the problems that led to the need for Jordan's Principle, only at a much more complicated jurisdictional level. It is thus imperative that greater Indigenous control over child and family services be achieved through tripartite negotiations that respect cooperative federalism[81] and the role of provinces in the constitutional framework.

47. The QCCA described the request to enter a coordination agreement as "the keystone of the system established by the *Act*"[82] because "it triggers the application"[83] of the *Act's* paramountcy and conflict of laws schemes.[84] However, a further important function of s. 20(2), in conjunction with ss. 20(3) and the incorporation by reference in s. 21(1), is to give the force of law (as federal law) to IGCP Laws that would otherwise likely be of questionable validity absent a judicial determination that s. 35(1) includes the right of self-government. It is doubtful that, prior to a judicial determination that an Indigenous Group holds a right to self-government over child and

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[81] *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at para 17, and *NIL/TU,O*, *supra* note 78 at para 44.
[82] QCCA Opinion, at para 249 referring to the *Act*, *supra* note 1 at ss. 21(1) and 22(3).
[83] *Ibid*.
[84] *Ibid.*

family services, Part II could achieve the same practical and legal effects by relying solely on the declaration in s. 18 and notice under s. 20(1).

48. Thus, Parliament through the incorporation in s. 21(1) claims IGCP Laws have existing independent force of law while actually giving them force of law as federal law. This approach is evident from information published online pursuant to s. 25 of the *Act*.[85] As Canada's website shows, no IGCP Laws are recognized as being in force pursuant to notices under s. 20(1). Rather, pursuant to s. 20(3), one-year after the request is made to enter a coordination agreement under s. 20(2), Canada recognizes the IGCP Laws as having independent force as well as having the force of law as federal law.

49. As the QCCA recognized, while Parliament could "adopt the legislation of another jurisdictional body,"[86] it could only do so for valid federal purposes.[87] It is not a valid federal purpose, and so beyond Parliament's s. 91(24) powers, for Parliament to incorporate IGCP Laws as federal law to give them paramountcy over provincial laws. Underpinning the QCCA's reasons for finding ss. 21(1) and 22(3) *ultra vires* was that Parliament had "amended the purpose and scope of s. 35(1) … without provincial approval."[88]

50. Provincial approval in the recognition and application of self-government under s. 35 is critical to Canada's 1995 Inherent Rights Policy, which states "provincial governments are necessary parties to negotiations and agreements where subject matters being negotiated normally fall within provincial jurisdiction or may have impacts beyond the Aboriginal group or Aboriginal lands in question."[89] However, Parliament through Part II of the *Act* has, in essence, implemented its 1995 Inherent Rights Policy without any provincial involvement.

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[85] Notices and requests related to An Act, *supra* note 31; see note 36 to the AGC's Factum. See also QCCA Opinion at note 276.
[86] QCCA Opinion at para 538.
[87] *Ibid.*
[88] *Ibid* at para 548.
[89] Canada, *Federal Policy Guide – Aboriginal Self-Government – The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, Ottawa, Indian Affairs and Northern Development, 1995 at p. 4 [Book of Authorities Tab 1]. See QCCA Opinion, at paras 25, 55, 183-185, 189, 191, 193, 194, 212, 222, 253, 271, and 432.

51. Contrary to the assertions of the AGC, the *Act* was not developed in collaboration with Alberta or the other provinces.[90] Thus, the same lack of respect for the jurisdiction of the provinces in ss. 21(1) and 22(3) is evident in the approach of Parliament in ss. 18, 20(2), 20(3) and 21(1), which seek to effectively expand the scope of s. 35(1) without provincial input and approval.

52. Though anticipatory incorporation by reference is a valid legal tool to enact the same law as another jurisdiction[91] without having to repeat the adopted law verbatim[92], case law and commentary have recognized constitutional limits to its use.[93] These limits are expressed as the need for each legislature to act independently of the other so the technique is not used to impermissibly delegate by expanding the powers of either the referring or referred jurisdiction[94], and the requirement of a valid purpose or rational basis for the adoption of the other jurisdiction's law[95] so to avoid abuse of the technique.[96] The purposes served in adopting a law that otherwise has no force of its own generally relate to matters of governmental harmonization or cooperation, and may involve necessity.[97]

53. Accordingly, the technique has been found valid to give legal force: to defences recognized in England (referred jurisdiction) to proceedings enforcing an English maintenance order in Ontario (referring jurisdiction)[98], to provincial and municipal (referred jurisdiction) highway laws

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[90] AGC Factum at paras 1, 13, and 81, and note 13. See also QCCA Opinion, at para 203.
[91] Peter Hogg, Constitutional Law of Canada, 5th edition Supp, loose-leaf (Toronto: Thomson Reuters Canada Limited, 2019) [Hogg] vol. 1 at § 14:12 [Book of Authorities Tab 3]; JM Keyes, *Executive Legislation*, 3rd ed (Markham: LexisNexis Canada Inc, 2021) [Keyes] at pp. 552, 554, and 580-582 [Book of Authorities Tab 4].
[92] See Hogg, *ibid*; and see also at § 14:13.
[93] Keyes, *supra* note 91 at p. 581 citing *R v Glibbery*, [1963] 1 OR 232 (Ont. C.A.) [*Glibbery*]; *Meherally v Canada (Minister of National Revenue)*, [1987] 3 FC 525 (F.C.A.) [*Meherally*]; and *9191-9380 Quebec Inc. (Les Tabacs Galaxy) v Canada*, 2005 FC 895 at para 30*ff.* (F.C.). See also Keyes, *supra* note 91 at pp. 100-102.
[94] Hogg, *supra* note 91 at § 14:14; Keyes, *supra* note 91 at pp. 100-101.
[95] *Ibid*, at p. 101.
[96] *Ibid*, at p. 101-102, note 268 citing Gerard V. La Forest, "Delegation of Legislative Authority in Canada" (1975) 21 McGill L.J. 131 at 142 and W. R. Lederman, "Some Forms and Limitations of Co-operative federalism" (1967) 45 Can. Bar Rev. 409 at 427-28.
[97] Keyes, *supra* note 91 at pp. 580-581.
[98] *Attorney General of Ontario v Scott*, [1956] SCR 137 per Abbott J. at p 146 as discussed in Keyes, *supra* note 91 at p 101, note 264.

on federal (referring jurisdiction) highways[99], and to insurable employment under provincial (referred jurisdiction) civil service Acts for the purposes of federal (referring jurisdiction) employment insurance.[100]

54. However, there is no legitimate federal purpose to give the force of federal law to IGCP Laws given the declaration in s. 18 and Parliament's clear intent to recognize IGCP Laws as having independent force of law.[101] The purpose of ss. 18, 20(2), 20(3) and 21(1) is not to facilitate "the effective exercise of the legislative authority".[102] Rather, Parliament's borrowing of the IGCP Laws is done to give force to IGCP Laws as federal law in order to assist in giving legal effect to IGCP Laws by also recognizing them as having independent force of law. In doing so, Parliament used incorporation by reference to assist in unilaterally expanding the scope of s. 35(1) by giving practical and legal effect to IGCP Laws. This is beyond Parliament's s. 91(24) jurisdiction.[103]

55. Parliament cannot through its declaration in s. 18 bind provinces to its views on the scope of s. 35(1), and thereby foist on the provinces IGCP Laws as having independent validity. However, Parliament seeks to do just this through its declaration in s. 18 and the operation of ss. 20(2), (3), and 21(1). That Parliament intended to widen the scope of s. 35(1) and change Canada's constitutional structure through Part II of the *Act* is evidenced by a comparison with the approach taken in Part II to the other legislative choices that were available.[104]

56. The AGC argues it could have instead delegated its powers to Indigenous Groups to enact their own laws on child and family services.[105] While this may be true under its s. 91(24) powers, there is no doubt that Parliament intended to establish a jurisdiction that stems from s. 35 of the *C.A. 1982* itself and not from delegation.[106] Parliament, though, clearly wanted to do more than

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[99] *Glibbery*, *supra* note 93 at 236 as discussed in Keyes, *supra* note 91 at p 101, note 263.
[100] *Meherally*, *supra* note 93 as discussed in Keyes, *supra* note 91 at p 581, notes 174 and 175.
[101] See AGC Factum at paras 187-189.
[102] AGC Factum at para 189; and QCCA Opinion, at para 253.
[103] QCCA Opinion, at para 538.
[104] See AGC Factum at paras 178-180, 187-189, and 196-204.
[105] AGC Factum at paras 179 and 197; and see also AGC QCCA Factum, at paras 10 and 137.
[106] AGQ Factum, at para 33, note 39.

"simply" state its position on the scope of s. 35(1).[107] It also wanted to implement the affirmed right by giving practical and legal effect to its declaration in s. 18.

57. This Court "has clearly recognized that incorporating by reference the laws of another jurisdiction does not infringe the constitutional division of powers,"[108] however Parliament's unusual approach in s. 18 of declaring its view on the scope of s. 35(1) coupled with the anticipatory character of the incorporation in s. 21(1) makes it difficult to distinguish from a delegation.[109] The *Act* purports to incorporate laws as federal law which do not yet exist, passed by a body which may or may not yet exist, and without any court determination of a s. 35 right.

58. The distinction between anticipatory incorporation and delegation becomes significant "where the enactments of another Canadian legislative body"[110] have been incorporated because of the constitutional prohibition on inter-delegation of legislative power[111] prohibiting Parliament from delegating its powers where this "would disturb the scheme of distribution of powers in the Constitution."[112] From this perspective, the force of federal law and paramountcy provided by ss. 21(1) and 22(3) seek to give force to IGCP Laws that Indigenous Groups would not have the jurisdiction to give them and thereby seek to expand the s. 35 powers of Indigenous Groups. The same is true of the purpose and effects of s. 20(2), (3) and 21(1).

59. It is thus inaccurate to state that "from a division of powers perspective"[113] all of the legislative options open to Parliament to give Indigenous Groups greater control over child and family services would "have the same consequences."[114] Rather, Parliament could not both declare a new order of government and then delegate its powers to that new government.

60. While Parliament instead chose to combine a declaratory provision (s. 18) to assert the existence of the s. 35(1) right to self-government in conjunction with provisions incorporating the

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[107] AGC Factum, at para 91.
[108] Keyes, *supra* note 91 at p. 579 citing *Coughlin v Ontario Highway Transport Board* [1968] SCJ No. 38, [1968] SCR 569 at p. 575 (SCC).
[109] See Hogg, *supra* note 91 at §14:13.
[110] *Ibid.*
[111] *AGNS v AG Canada (Nova Scotia Inter-delegation)*, [1951] SCR 31.
[112] Hogg, *supra* note 91 at §14:10.
[113] AGC Factum at para 199.
[114] *Ibid.*

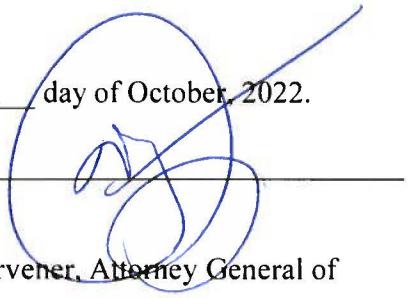
IGCP Laws to give them the force of law as federal law (s. 20(2), (3) and 21(1)), there is no rational basis to give force of law to laws that Parliament already says are in force. The purpose and effect of s. 18 in the context of the operation of s. 20(2), 20(3), and 21(1), is not to "merely" note "the existence" of the inherent right.[115] Its purpose and effect is to give life to and implement the affirmed right in a way that seeks to force recognition of the existence of a third order of government upon the provinces. As such, this approach attempts to use incorporation by reference to unilaterally change the scope of s. 35(1) and fundamentally alter Canada's constitutional architecture.

61. Through the approach taken in Part II of the *Act*, Parliament recognizes IGCP Laws as having independent force of law without a court determination that the inherent right exists, and then seeks to give provinces no choice but to agree with Parliament's view on the matter. This is not cooperative federalism Sections 20(2), 20(3), 21(1) and 22(3) of the *Act* are *ultra vires* Parliament.

PART IV – COSTS

62. The AGA does not seek costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of October, 2022.



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[115] QCCA Opinion, at para 514. See also AGC Factum at para 91.

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